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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 190

CHARLES F. RUBSAM,
Petitioner,

vs.

HARLEY C. LONEY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

CASPER W. OOMS,
209 South La Salle Street,
Chicago 4, Illinois,
Attorney for Respondent.

Of Counsel:
ROBERT C. WILLIAMS,
209 South La Salle Street,
Chicago 4, Illinois.

THE BLAKELY PRINTING COMPANY, CHICAGO

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"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Mr. Justice Jackson, in *Graver v. Linde* (1949), 336 U. S. 271, 275.

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STATEMENT OF THE CASE.

The Petition for Writ of Certiorari admittedly (Pet. p. 4) seeks an "interpretation" of a single paragraph of a contract between the parties. It admits (Pet. p. 8) that the District Court was "amply informed," at least as to some matters. It seeks review of fact questions (Pet. p. 9) which the District Court "overlooked or ignored."

The Petition presents no grounds for review by this Court. None of the requirements governing review on Certiorari, found in Rule 19, is present here. None of the considerations expressed in, or which come within the contemplation of, Rule 19 is present.

While the Petition purports to comply with the requirements of Rule 40, its selective presentation of only part

of the facts obscures the issues on which both lower courts refused Petitioner's claim. Because of this confusion Respondent has found it necessary to state the case rather fully.

This Contract Case Between Private Litigants Is Without Significance to the Public or the Law.

This case concern a patent license—a private contract involving automobile wheel balance weights. Most of the patents referred to in the license have expired (R. 143). The patented device was invented over twenty years ago. It includes a weighted body portion and some means for securing that weighted body portion to the tire-retaining rim flange of an automobile wheel. These devices are employed at the factory to balance the automobile wheel and tire which it bears. Sales of the weights for this purpose to automobile manufacturers are in the "production" field. Wheels not balanced at the factory are balanced by garage men or service station operators. Sales of the weights for this purpose are in the "service" field (R. 45).

The controlling question in the present controversy is whether Respondent owes royalties to Petitioner at the rate of one-half cent per balance weight for all balance weights sold by Respondent in the production field since January 1, 1948 under a contract expressed in four documents (Pl. Ex. A, R. 4; Pl. Ex. B, R. 6; Pl. Ex. C, R. 9; Def. Ex. 1, R. 21). To reach their concurrent conclusions that Respondent does not owe such royalties, the District Court considered several hundred pages of testimony and several hundred documents, and the Court of Appeals reviewed the Record as presented with the Petition. The conclusions reached by the District Court were affirmed (217 F. 2d 353) after a full hearing on appeal by the

Court of Appeals for the Sixth Circuit. Petitioner sought by Petition for Rehearing below to obtain a further review of the facts. The Court of Appeals denied that petition.

The District Court Opinion Presents a Finely Distilled View of the Facts Petitioner Seeks to Have Reviewed.

District Judge Thornton has written a most cogent opinion summarizing the facts (R. 44). Significantly Judge Thornton did not cite a single authority in support of any proposition of law mentioned in his opinion. This was because the case turns—not on rules of contract law, but—on the unique and complex facts which fill this record.

Only the first half of Judge Thornton's Opinion (117 F. S. 164-174, R. 44-60) is concerned with the alleged issues of the present Petition. The remainder of the Opinion is addressed to issues which have been jettisoned by Petitioner.

The Contract Under Which Petitioner Claims Is Bounded by Readily Ascertainable Exceptions Which Are Clearly Stated in the Granting Clause.

Judge Thornton's Opinion details (R. 45) how in December, 1932, one Hume (Respondent's assignor) filed a patent application on a wheel balance weight. In the same month he granted a non-exclusive license under that application to Chrysler Corporation (Def. Ex. 25, R. 151a). Approximately six months later he granted a non-exclusive license to Nash Motor Company (Def. Ex. 26, R. 156a).

Some time later, Hume's application was thrown into interference with an application filed in the name of one DuSang. On December 12, 1934, Hume and DuSang settled that interference by means of a written contract (Def.

Ex. 1, R. 21). That contract provides for several grants between the parties. In Paragraph 3,

> "* * * Hume licensed DuSang *exclusively* to manufacture a spring clip cast-on weight for either production or service at a set royalty, and by granting this exclusive license for the cast-on weight, Hume deeded away from his own control any right to make or sell the cast-on type of weight." (Judge Thornton, 117 F. S. 164 at 167, R. 46-7.) (Emphasis supplied.)

That granting paragraph does not appear in the Petition. It is the clue to the later exchange of rights between Petitioner and Respondent in 1936, and is the basis for the decisions of the District Court and the Court of Appeals. In words, it provides as follows (R. 23):

> "3. First party [Hume] hereby grants to second party [Du Sang], his heirs and assigns, subject to the provisions herein set out, an exclusive license throughout the United States without restriction as to original equipment, or jobbing or direct to user sales, for the life of the patent and/or patents that may issue to first party [Hume] on his aforesaid application Ser. No. 645,504 and/or any other application or applications pertinent thereto, to make, use and sell that specific form of the invention as shown in Figs. 1 and 2 of the drawing in second party's [Du Sang's] application Ser. No. 718,915, namely, a weight having a spring clip attachment portion carrying a weighted body cast upon one portion thereof, and second party shall pay to first party a royalty of one (1¢) cent for each and every weight of this form sold."

Paragraphs 4 and 5 of the Hume-DuSang contract (Def. Ex. 1, R. 21) similarly limit Hume's rights in the cast-on weight field. Those limitations are described by Judge Thornton (117 F. S. 167, R. 47):

"The net effect of paragraphs 3, 4 and 5 was Hume's granting the exclusive rights to the cast-on spring-clip weight to DuSang. Even though, by paragraph 4, Hume obtained a nonexclusive license from DuSang, paragraph 5 prevented his sublicensing to any party who might subsequently obtain rights under the Hume patent, unless the patents were sold outright."

Hume's application was also in interference with an application filed by Petitioner, Rubsam. In February, 1936, Hume, his assignee, the Respondent Loney Company, and the Petitioner Rubsam, settled this second interference by contract (Pl. Ex. A, R. 4; Pl. Ex. B, R. 6). In that settlement Hume granted certain rights to Rubsam. That granting clause is the clause for which Petitioner now seeks an "interpretation" in addition to the concurrent interpretations given it by the District Court and the Court of Appeals.

Judge Thornton quotes the entire paragraph (117 F. S. 167-8, R. 48-9):

"2. Hume and Loney hereby grant to Rubsam an exclusive license under United States patent to issue on said application No. 654,504 and/or under any other patent that may issue on any application for letters patent by Hume and/or that may be owned or controlled by Hume or Loney for the life of any and all of said patents, and without royalty payments, to manufacture and sell throughout the United States balance weights to automobile manufacturers as standard equipment to be used in balancing wheels at the assembly plant, but not elsewhere, having a resilient spring clip for retaining the weight in position upon the edge of the tire retaining flange of the wheel rim; *provided, however, that the herein granted license is subject to outstanding licenses entered into* between Hume and Chrysler Motor Corporation of Detroit, Michigan, dated December 13, 1932, between Loney and the Nash Motor Company of Kenosha, Wisconsin, bearing date June 29, 1933 and *between*

Hume and Virgil L. DuSang, Kokomo, Indiana, executed December 4, 1934; provided, further, that the herein granted license does not extend to balance weights having spring clips sold to automobile manufacturers to be used in service and is specifically restricted to balance weights having a resilient spring clip for holding it in position upon the rim flange as distinguished from the employment of a set screw or other fastening means." (Emphasis added.)

The presentation of this clause in the Petition is less than candid. The broad granting portion appears on page 4. The proviso containing the exception—about which this entire case turns—is belatedly reproduced on page 6.

As pointed out by Judge Thornton, the parties are in substantial agreement as to most of the provisions of Paragraph 2. They are completely in agreement as to the meaning of the exceptions carved out in favor of Chrysler and Nash in the following language:

> "* * * subject to outstanding licenses entered into between Hume and Chrysler Motor Corporation of Detroit, Michigan, dated December 13, 1932, between Loney and the Nash Motor Company of Kenosha, Wisconsin, bearing dated June 29, 1933, * * *."

Petitioner admits (Pet. p. 6) that he is not making any claim for royalties by reason of any change in the Chrysler or Nash agreements.

The disagreement between the parties is as to the effect of the exception carved out to DuSang in the following words:

> "* * * subject to outstanding licenses entered into * * * between Hume and Virgil L. DuSang, Kokomo, Indiana, executed December 4, 1934 * * *."

On February 17, 1936, when Rubsam and Hume signed Pl. Ex. A, DuSang certainly owned the *exclusive* rights to

make the cast-on form of weight. He had obtained this in the contract of December 12, 1934 (Def. Ex. 1, R. 21). As to that form of weight, Hume and Respondent were powerless to grant rights to Rubsam. Therefore no rights were granted to Rubsam to the cast-on weight, by Paragraph 2 of Pl. Ex. A (R. 4). All rights to the cast-on weight were specifically excepted by the language which mentions the earlier Hume-DuSang contract (Def. Ex. 1, R. 21).

Petitioner Claims That the Subsequent Cancellation of the Hume-DuSang Agreement Somehow Vested Rights from DuSang Through Hume-Loney to Rubsam.

On July 18, 1938, an agreement (R. 34) was executed between Turner Mfg. Co. (DuSang's assignee) and Respondent, Loney Company (Hume's assignee). This agreement settled litigation then pending between Turner and a customer of Loney.

In the preamble the parties state (R. 34):

> "WHEREAS it is now the desire of the parties Loney and Turner to settle all pending litigation, and to cancel the original Hume-DuSang cross-licensing agreement under which the parties Loney and Turner have been heretofore operating, and to substitute the following license agreement, and"

The agreement provides in Paragraph 1 (R. 35) that:

> "All other cross-licensing agreements involving the Hume Patent No. 2,036,757, and any and all improvements thereon, under which the parties Loney and Turner have heretofore operated, are hereby cancelled and terminated."

Petitioner asked the District Court to find that this cancellation of the original Hume-DuSang agreement, although unaccompanied by any transaction between Pe-

titioner and Respondent, resulted in a transfer to Rubsam of the exclusive rights given to DuSang in 1934. The District Court refused to make such a finding. Judge Thornton's reaction to this proposition (117 F. S. 169, R. 51-2):

> "* * * to permit the Court to find for the plaintiff in this respect it would be necessary to find that at some time during the dealings between the parties the provision in relation to cast-on spring-clip weights in the exclusive license given by Hume to DuSang was divorced from the Hume-DuSang license and given over to Rubsam. However, the Court can find nothing in the testimony and/or the exhibits that would warrant it in withdrawing cast-on spring-clip weights from the exclusive field in which they were placed by the Hume-DuSang license agreement, and placing them in the control of Rubsam at a subsequent time, and at a time when Rubsam knew, or should have known, that the license granted him by Hume and Loney on February 17, 1936, was subject to the exclusive license granted by Hume to DuSang on December 4, 1934."

Petitioner argued the same point *in extenso* before the Court of Appeals for the Sixth Circuit. That Court likewise refused to find any such transfer of rights. Its Opinion states (217 F. 2d 354, Pet. pp. 16, 17):

> "As pointed out by the District Judge, at the time when Exhibits A and B were executed the license thereby granted to Rubsam was subject to outstanding licenses entered into between Hume and each of the following, namely, Chrysler, Nash and Du Sang. Exhibit A expressly provides that the license being granted to Rubsam was subject to those outstanding licenses. We agree with his ruling that the provision in relation to cast-on spring clip weights in the exclusive license given by Hume to DuSang was at no subsequent time divorced from the Hume-DuSang license and given over to Rubsam. * * * Any new rights acquired by Loney through this agreement did not pass to Rubsam through the medium of the original license agreement, Exhibit A, as contended by Rubsam."

Rubsam now seeks to review the determination by Judge Thornton and the concurring determination by the Court of Appeals for the Sixth Circuit that the cancellation of the Hume-DuSang agreement did not cause rights to pass from DuSang to Rubsam. The intent of the parties clearly expressed in the granting clause in question is fully substantiated by the facts found in the Record reviewed by the District Judge, and again reviewed by the Judges of the Court of Appeals. Petitioner seeks another review of that testimony and those documents to reverse the concurrent Findings of Fact of those lower courts.

ARGUMENT.

The Factual Determinations Made by the District Court and Characterized by the Court of Appeals as Being "Supported by the Evidence" Should Not Be Reviewed Here.

The District Court Opinion (117 F. S. 164) is characterized by the Court of Appeals as being "well-developed" (217 F. 2d 354). Judge Thornton, in the preparation of his Opinion studied several hundred pages of transcript and several hundred documentary exhibits. His analysis of the complicated fact situation, and its ready resolution by elementary legal principles, is emphasized by the fact that his opinion does not contain a single citation to case law authority.

The case is a simple question of contract intrepretation based on unique and complex facts. It is without significance to the public or the law.

The policy of this Court in refusing to review factual determinations in the absence of a clear indication of prejudice and reversible error below has been restated

numerous times recently. In *Allen* v. *Trust Co. of Georgia* (1946), 326 U. S. 630, at 636:

> "Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence."

In *Faulkner* v. *Gibbs*, 338 U. S. 267, we find at 268:

> "We will not disturb the concurrent findings upon the issues presented to us in the Petition for Certiorari."

The classic statement by Mr. Justice Jackson in *Graver* v. *Linde* (1949), 336 U. S. 271, at 275, appears here opposite page 1. That sentence bears repeating:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Conclusion.

This case involves special and novel facts and no critical or even interesting questions of law. Both courts below have reached identical findings and conclusions on a voluminous record. This mere contract controversy between two private parties in no way satisfies the requirements for a writ of certiorari as defined in Rule 19.

The Petition should therefore be denied.

Respectfully submitted,

CASPER W. OOMS,
209 South La Salle Street,
Chicago 4, Illinois,
Attorney for Respondent.

ROBERT C. WILLIAMS,
209 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

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PETITIONER'S BRIEF IN OPPOSITION TO BRIEF FOR RESPONDENT

CHARLES F. RUBSAM
PRO SE
1072 Garcia Road
Santa Barbara, California

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The original Hume-DuSang exclusive license under Def. Ex. 1 was nullified after the invention of cast-on weight was disclaimed on July 23, 1947 1

Judge Thornton never considered the "Disclaimer" which is a part of DuSang Patent No 2,029,561, Plf. Ex. E-1, and the Court of Appeals likewise ignored it 2

An assignment of a patent or of an application for patent transfers the entire interest in the patent to the assignee 3

By Assignment Ex. 2, Respondent acquired from Hume all rights under the agreement Def. Ex. 1 3

By Assignment Ex. G, Respondent terminated the original Hume-DuSang exclusive license covered by Def. Ex. 1 3

By Assignment Ex I, Respondent became the owner of the DuSang Patent which brought it under Petitioner's exclusive license covered by paragraph 2 of Contract Ex. A 4

Neither the District Court nor the Court of Appeals considered the Assignments Ex. 2, Ex. G and Ex. I 4

Argument 5

The Evidence shows the contrary of the determinations made by the District Court and by the Court of Appeals 5

Conclusion 6

Pamphlet "General Information Concerning Patents" inserted after page 6